REMARKS

Claims 1-5 are pending in the present application. Claims 1 is herein amended. No new matter is believed to have been entered through the claim amendment. Further, upon belief, it is respectfully submitted that this paper is fully responsive to the outstanding Office Action.

Claim Rejection - 35 U.S.C. §103

Claims 1-5 were rejected under 35 U.S.C. §103(a) as being unpatentable over Kenner et al. (US 5,956,716) in view of Northcutt et al. (US 7,346,689 B1) and Rao et al. (US 7,406,248 B1).

The rejection is respectfully traversed.

Claim 1 has been amended to recite, "wherein the moving picture file distributing device is a server." Support for the aforementioned recitation may be found in at least page 8, lines 10-12 of the originally filed Specification of the present application which states, "an operation of a moving picture file distributing device (server) 1 according to the present embodiment will be described at first for the time of uploading." It is respectfully submitted that the cited art fails to teach or suggest, either alone or in combination, at least the aforementioned recitation of claim 1 of the present application.

In the outstanding Office Action, the Examiner concedes that the primary reference (Kenner) does not describe the upload buffer generating means as recited in claim 1 of the

present application. On page 4 of the outstanding Office Action, the Examiner contends that, "Rao teaches a device for uploading data where the received data is stored in a temporary buffer, which is allocated from memory, until the server designated to receive the upload is available to receive the data (see [cols. 2-3, ll. 65-12], [col. 3, ll. 21-27]; see also [col. 8, ll. 12-21])." The Examiner's contention is respectfully traversed.

Further to the Examiner's contention above regarding Rao describing the upload buffer generating means recitation of claim 1 of the present application, Rao relates to a digital image retrieval and storage and states, "in an aspect of the invention, a facility is provided for uploading images directly from a device to a server using **upload software that executes on a client computing equipment**." (Rao; column 2, lines 49-52).

Further, the cited portion of Rao states that "the client software is configured to interface with driver software executing in the client (PC, STB, HIC, etc.), and interfaces with a server (e.g., a CHE, photo web server, etc.) during an upload operation ... initially, the client upload software operates to establish a connection (e.g., a streaming connection) with the server ... in effect, **the client may act as a temporary buffer** between the device and the server during the upload process...**Since a temporary buffer, or other storage, is all that is needed for the upload to a server, the client computing equipment needs minimal storage capacity**...." (Rao; column 2, line 65 to column 3, line 23).

Accordingly, as Rao describes executing on client computing equipment, it is submitted that Rao does not describe at least the recitation of claim 1 of the present application of, "wherein the moving picture file distributing device is a server."

Additionally, in view of the foregoing description of Rao, it is submitted that the Examiner's asserted combination of Kenner with Rao is improper as Rao teaches away from the asserted combination. More specifically, MPEP 2141.02 entitled "Differences Between Prior Art and Claimed Invention" states that a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984). Further, as stated by the Federal Circuit, it is improper to combine references where the references **teach away from their combination**. *In re Grasselli*, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983). Accordingly, as Rao requires its upload software to be executed on a client computing equipment, Rao teaches away from the Examiner's asserted combination.

Further, MPEP 2143.01 entitled "Suggestion or Motivation To Modify the References" states in section V. (entitled "The proposed modification cannot render the prior art unsatisfactory for its intended purpose") that if a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125

(Fed. Cir. 1984). Further, section VI. of the same part states that if the proposed modification or combination of the prior art would **change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious**. *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). Accordingly, as Rao explicitly requires its upload software to execute on client computing equipment, it would be improper to employ said teachings on a server as the fundamental principle of operation would be modified rendering the art inoperable for its intended purpose. Additionally, nothing has been cited in Northcutt which cures the aforementioned deficiencies of Kenner and Rao.

Furthermore, Rao states, "the client may act as a temporary buffer between the device and the server during the upload process" (column 3, lines 9-10). The temporary buffer operates to absorb a difference between a communication speed in the device side and a communication speed in the server side, or to avoid that the device always become communication state with the server during the upload process.

On the other hand, in the present invention, the upload buffer and the download buffer are generated for avoiding the corruption of a file. When the upload buffer and the download buffer are not generated, the download file which is downloading is overwritten with an upload file and the download file is corrupted. According to the present invention, because the upload file is temporarily held in the upload buffer and the download file is temporarily held in the

download buffer, the file is updated with the upload file without the corruption and the download file is not corrupted. As mentioned above, the upload buffer and the download buffer are generated so that the file is correctly updated with the upload file and the download file is not corrupted.

Claims 2-5 of the present application, which each depend directly from independent claim 1, are patentable for at least the reason of their respective dependencies from independent claim 1, and further, the comments presented above over the cited art are applicable here (e.g., claims 2-5) where appropriate. Separate and individual consideration of the dependent claims is respectfully requested.

In view of the foregoing, it is respectfully submitted that the rejection is overcome.

Official Notice

At page 4 of the outstanding Office Action, the Examiner contends that, "at the time of the invention, it would have been obvious to one of ordinary skill in the art, to provide the same buffer allocation capability for uploading data, as taught in Rao, when providing a means of generating a buffer to optimize downloads in addition to the ability to upload data to remote servers, as taught in Kenner, because providing a means to allocate a buffer for efficiently

uploading data to a server is a **well-known** means to optimize server operation (see [col. 8, ll. 12-21]). The Examiner's taking of Official Notice is respectfully traversed.

It is noted that: 1) the cited portion of Rao does not describe downloading; but instead, only relates to uploading operations, and as such, it is unclear how the Office Action can make such a statement when each of Rao and Kenner are disparate in their individual operational capabilities. 2) Additionally, as Rao describes executing the upload software on the client computer as described above, the Office Action's statement regarding "optimizing server operations" is likewise deficient. The Examiner is respectfully requested to respond to each of these notations if the taking of Official Notice is maintained in another Office Action.

The Examiner is respectfully reminded that with respect to Official Notice, the MPEP states that "such rejections should be judiciously applied" (see MPEP § 2144.03). It is noted that contrary to the caution advised by the MPEP, in this case, the Office Action liberally applied Official Notice to for various conclusory reasons that are not supported by the record.

The MPEP further mandates that "Official notice without documentary evidence to support an [E]xaminer's conclusion is permissible only in some circumstances" (see MPEP § 2144.03(A)). "It would not be appropriate for the [E]xaminer to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of **instant and unquestionable** demonstration as being well-known" (see *Id.*, emphasis added).

"For example, assertions of technical facts in the areas of esoteric technology or specific knowledge of the prior art must **always be supported by citation** to some reference work recognized as standard in the pertinent art. *In re Ahlert*, 424 F.2d at 1091, 165 USPQ at 420-21" (*Id.*, emphasis added). It is noted that no such support has been provided here. Reviewing courts must rely on the record, and the Federal Circuit has always required that absent the case where Official Notice is "instant and unquestionable", the Office Action must provide support and reasoning for Official Notice to be proper.

It is respectfully submitted that if the Examiner is to maintain their taking of Official Notice in another Office Action, they are requested to provide support for their contentions further to the rigorous requirements listed above, and further, to respond to the notations listed above.

IDS

As an IDS was filed on November 24, 2008 (after the mail date of the outstanding Office Action), the Examiner is respectfully requested to provide the Applicants with an initialed and signed copy of Form PTO/SB/08 to confirm that the Examiner considered the items listed therein.

In view of the aforementioned amendments and accompanying remarks, Applicants submit that the claims, as herein amended, are in condition for allowance. Applicants request such action at an early date.

If the Examiner believes that this application is not now in condition for allowance, the Examiner is requested to contact Applicants' undersigned attorney to arrange for an interview to expedite the disposition of this case.

If this paper is not timely filed, Applicants respectfully petition for an appropriate extension of time. The fees for such an extension or any other fees that may be due with respect to this paper may be charged to Deposit Account No. 50-2866.

Respectfully submitted,

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